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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

E.K. McDANIEL, Warden, Ely State Prison; ROBERT BAYER, Director, Nevada Department of Prisons; FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada

Cross-Petitioners,

v.

GERALD ARMOND GALLEGO,

Cross-Respondent,

BRIEF OF CROSS-RESPONDENT IN OPPOSITION TO THE CONDITIONAL CROSS-PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAW OFFICE OF RICHARD F. CORNELL
150 RIDGE ST., SECOND FLOOR
RENO, NEVADA 89501
702/329-1141
Counsel for Cross-Respondent
Per 21 U.S.C. § 848q(9)

EDITOR'S NOTE

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LAW OFFICE OF RICHARD F. CORNELL
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RICHARD F. CORNELL, Esq.
150 Ridge St., Second Floor, Reno, Nevada 89501
Telephone (702) 329-1141 Facsimile (702) 329-7651
E-mail/rcorn150@aol.com

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RICHARD F. CORNELL, Esq.
150 Ridge St., Second Floor, Reno, Nevada 89501
Telephone (702) 329-1141 Facsimile (702) 329-7651
E-mail/rcornl50@aol.com

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RICHARD F. CORNELL, Esq.
150 Ridge St., Second Floor, Reno, Nevada 89501
Telephone (702) 329-1141 Facsimile (702) 329-7651
E-mail/rcorn150@aol.com

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RICHARD F. CORNELL, Esq.
150 Ridge St., Second Floor, Reno, Nevada 89501
Telephone (702) 329-1141 Facsimile (702) 329-7651
E-mail/rcorn150@aol.com

RICHARD F. CORNELL, Esq.
150 Ridge St., Second Floor, Reno, Nevada 89501
Telephone (702) 329-1141 Facsimile (702) 329-7651
E-mail/rcornl150@aol.com

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I. QUESTIONS PRESENTED FOR REVIEW

1. Were the Conditional Cross-petitioner's questions presented for review adequately preserved to the Court below?

2. Can a reviewing federal court ever be required to conduct a "harmless error" analysis upon finding that an executive clemency instruction to a Nevada jury, which is a "deathworthy" issue, is erroneous?

3. If the answer to question "2" is in the affirmative, is the error herein not harmless due to the constitutional error *viz.* jury selection?

4. Does an executive clemency instruction which is misleading, in terms of the lack of probability either of executive clemency or of release on parole at the time of the capital petitioner's trial, violate the Eighth Amendment?

II. OPINIONS AND JUDGMENTS BELOW

This is accurately set forth in the Conditional Cross-petition, as well as in Gerald Armond Gallego's Petition in Case No. 97-8160.

III. JURISDICTIONAL STATEMENT/CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the authority set forth by the Conditional Cross-petitioners, Nevada Revised Statutes, Sections 200.030, 200.033, 200.035 and 175.552

IV. STATEMENT OF THE CASE

Cross-petitioners' recitation of the Statement of the Case in their Conditional Cross-Petition is accurate.

V. REASONS FOR DENYING THE WRIT

A. INTRODUCTION:

1. A COMPARISON OF HOW CONDITIONAL CROSS-PETITIONERS RAISE THE QUESTIONS PRESENTED FOR REVIEW AGAINST HOW THEY PRESENTED THE ISSUES TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Ultimately, the Conditional Cross-petition for Writ of *Certiorari* is without merit, and can easily be denied on that basis, as the Court shall see. Preliminarily, however, the Court should understand that procedurally, *certiorari* cannot providently be granted as to the main question presented for review, because it was not raised in anything close to the format as raised herein to the court below.

Gallego was the appellant in the court below, and as the Court can ascertain from the published opinion at 124 F.3d 1065, a number of issues were raised. The Conditional Cross-petitioners discussed the "executive clemency" issue to the Ninth Circuit at pages 84-89 of the answering brief of the Appellees, a true and correct copy of

which is attached hereto as Ex. "A." The "executive clemency" issue was presented as "Ground 10" in Gallego's 28 U.S.C. § 2254 Petition to the United States District Court for the District of Nevada. As it appears therefrom, the attorney general's argument was that Hamilton v. Vasquez, 17 F.3d 1149,1161-64 (9th Cir.), cert. denied *sub nom*, 512 U.S. 1220 (1994) was distinguishable, on the basis that the defective "executive clemency" instruction there was more misleading than the one at bar; and the one at bar was not inaccurate, and therefore, not unconstitutional. (Ex. "A," pp. 87-88) Nevada's attorney general also argued that Gallego had "deliberately misinterpreted" NRS 213.1099(4) in order to set up his argument. (Ex. "A," p. 89) In other words, the attorney general's position to the court below was not that the "executive clemency" instruction given in Gallego's case constituted "harmless error" which had to be analyzed per Brecht v. Abrahamson, 507 U.S. 619 (1993). Nowhere are the words "harmless error" found in the attorney general's argument therein. It is true that the attorney general made a general "harmless error" argument at page 124 of their brief. (See: Ex. "B") However that was a generic statement at the end of their brief, whereby it would be impossible for the Ninth Circuit to determine what alleged errors (guilt or penalty phase) the attorney general was referencing, and why Brecht would be applicable at all to any sentencing or penalty phase issues.

Likewise, nowhere in the Conditional Cross-petitioner's brief to the court below, did the attorney general argue that resolution of the "executive clemency" issue necessarily implicated Simmons v.

South Carolina, 512 U.S. 154 (1994), and that Simmons constituted a "new rule" for purposes of Teague v. Lane, 489 U.S. 288 (1989). However in fairness, the court below did pass on that issue, even though not raised in the brief. See: Gallego, 124 F.3d at 1076.

It is fundamental that this Court does not consider issues not raised or inadequately preserved in the briefs to the court below, unless the court below raised them. See: Hoover v. Ronwin, 466 U.S. 558, 574, n. 25, 104 S.Ct. 1989, 1998 n. 25, 80 L.Ed 2d 590 (1984), rehearing denied, 476 U.S. 1268 (1984); United States v. Ortiz, 422 U.S. 891, 899, 95 S.Ct. 2585, 2589, 45 L.Ed. 2d 623 (1975); Auer v. Robbins, ___U.S.___, 117 S.Ct. 1735, 1738-41, 118 L.Ed. 2d 352 (1997); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 697-98, 104 S.Ct. 2694, 2699, 81 L.Ed. 2d 580 (1984).

Based thereon, it would seem relatively clear that this Court should not even consider Conditional Cross-petitioner's first and main issue presented, because not only was it inadequately raised (at best) to the court below, but the court below – quite understandably – did not even consider it at Gallego, 124 F.3d at 1074-76. Simply put, assuming *arguendo* that there is some viability to the proposition that a federal appellate court can do a "harmless error" review of a "deathworthy" issue, how can one blame the Ninth Circuit for not engaging in such a "harmless error analysis" when they were not specifically asked to do so relative to this issue?!

Petitioners' second question would suffer from the same problem, insofar as their Simmons issue is concerned. However, the Ninth Circuit did them the favor of raising the issue for them, and

accordingly, that issue can ultimately be reviewed. For reasons stated below, however, it is utterly devoid of merit.

2. A BRIEF OVERVIEW OF NEVADA'S STATUTORY DEATH PENALTY SCHEME

In order to understand why Conditional Cross-petitioners' issues are without merit, it is necessary to understand the Nevada statutory scheme *viz.* the imposition of the death penalty.

In Nevada, a person convicted of first degree murder is punished either by death, by imprisonment for life without the possibility of parole, or by imprisonment for life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served.[1] NRS 200.030(4) (Ex. "C") The death penalty can lawfully be imposed by statute only if one or more aggravating circumstances are found and any mitigating circumstances which are found do not outweigh the aggravating circumstance or circumstances. NRS 200.030(4)(a). NRS 200.033 (Ex. "D") lists the statutorily defined "aggravating circumstances," while NRS 200.035 (Ex. "E") lists six specific mitigating circumstances, plus a "catch-all" category of "any other mitigating circumstance." However, the defendant is not required to establish any mitigating circumstances in order to avoid being sentenced to death (Wesley v. State, 112 Nev. 503, 916 P.2d 793, 803, cert. denied, 137 L.Ed. 2d 346 (1996)), and a Nevada jury is never required to impose the death penalty, even if the aggravating circumstances established outweigh the mitigating established (or lack thereof). See: Bennett v. State, 106 Nev. 135, 144, 787 P.2d

[1]At the time of Gallego's trial, however, the possibility of parole eligibility was when a minimum of 10 years had been served.

797, 803, cert. denied, 498 U.S. 925 (1990)).

"Executive clemency" is nowhere mentioned in NRS 200.033 or 200.035. However, NRS 175.552(3) (Ex. "F") provides that, at a penalty hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim **and on any other matter which the court deems relevant to the sentence**, whether or not the evidence is ordinarily admissible. Thus, pursuant to that statute, evidence regarding "executive clemency" is admissible during the penalty phase of a Nevada capital murder trial. Petrocelli v. State, 101 Nev. 46, 55, 692 P.2d 503, 510 (1985).

Thus, as the Nevada Supreme Court explained in Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993), cert. denied, 115 S.Ct. 176 (1994), the court considers aggravating and mitigating circumstances in determining whether a capital defendant is **death-eligible**. See: Canape, 109 Nev. at 877-83, 859 P.2d at 1031-35. However, the "weighing" that goes on with a Nevada capital jury is only with respect to the death-eligibility process; matters such as character evidence *viz.* non-charged offenses and executive clemency instructions are matters of **deathworthiness**. See: Canape, 109 Nev. at 895-900, 859 P.2d at 1043-46 (J. Springer, dissenting).

Based upon Canape and Clemons v. Mississippi, 494 U.S. 738 (1990), a "harmless error" analysis is possible when an error occurs *viz.* an **issue of death-eligibility**. For example, in a hypothetical capital prosecution, if the Notice of Intent to Seek the Death Penalty listed four aggravating circumstances, the penalty jury found all four and no mitigating circumstances, and one of the aggravators was found

to be invalid, the Nevada Supreme Court could decide that a "score of 3-0" makes one just as "death eligible" as a "score of 4-0," and could find such an error to be harmless. But Nevada's attorney general's position doesn't implicate that scenario: Rather, she wants this Court to hold that where an error is made on a **deathworthiness** issue, and it is impossible from the record to determine what degree of weight the capital jury placed on the erroneous "deathworthy" information in returning the death penalty verdict, that nevertheless the federal court of appeals on review can and should engage in a "harmless error" analysis. As we shall show, Nevada's attorney general's position is not only unsupported by any authority, it is contradicted by every authority considering or marginally considering the issue.

B. A REVIEWING FEDERAL COURT SHOULD NEVER BE REQUIRED TO CONDUCT A HARMLESS ERROR ANALYSIS UPON FINDING THAT AN EXECUTIVE CLEMENCY INSTRUCTION TO A NEVADA JURY IS UNCONSTITUTIONAL

Brecht v. Abrahamson, *ante*, was not a capital murder case, and therefore its holding is necessarily limited to "guilt phase" or "trial" issues. Brecht arises out of the use of post-arrest silence, and whether such an error has a "substantial and injurious effect or influence in determining the jury's verdict." Brecht clearly addresses the issue of "constitutional harmless error" in a non-capital trial; nothing in Brecht begins to address how to assess a "deathworthy error" during the penalty hearing of a capital murder trial.

Statements of this Court in other opinions, however, suggest strongly that error as to a "deathworthy" issue in a penalty hearing is not subject to a harmless error analysis, but rather, is structural

error.

In Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed. 2d 256 (1989), this Court stated:

> In contrast to the carefully defined standards that narrow a sentencer's discretion to **impose** the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to **decline to impose** the death sentence. McCleskey v. Kemp, 481 U.S. 279, 304 . . . (1987)(emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relative to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential that the juries give a 'reasoned **moral** response to the defendant's background, character and crime.' Franklin [v. Lynaugh, 487 U.S. 164, 184, 108 S.Ct. 2320, 2333, 101 L.Ed. 2d 155 (1988) (O'Connor, J., concurring in judgment) . . .] In order to insure 'reliability in the determination that death is the appropriate punishment in a specific case,' Woodson [v. North Carolina, 428 U.S. 280 (1976)], the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.
>
> Penry, 492 U.S. at 327-28, 109 S.Ct. at 2951-52.

And, in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982), this Court held that exclusion of evidence which should have been admitted at the penalty phase could not be considered harmless. In citing to Lockett v. Ohio, 438 U.S. 586 (1978), this Court stated:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, **as a matter of law**, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.
>
> Eddings, 455 U.S. at 113-15, 102 S.Ct. at 876-77.

Moreover, even if an appellate court could engage in a "harmless error" analysis of a "deathworthy" issue, the United States Court of Appeals for the Ninth Circuit would not be the one to do so. Where reweighing is appropriate, it is the state court's duty to do so; one cannot "imply" that the state court did so, if it does not appear clearly in the state court's opinion. Sochor v. Florida, 504 U.S. 527, 539-40, 112 S.Ct. 2114, 2123, 119 L.Ed. 2d 326 (1992). Here, the Nevada Supreme Court did not even consider NRS 213.1099 in Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985), cert. denied, 479 U.S. 871 (1986). As appears clearly at the short discussion on this point at 101 Nev. at 789, 711 P.2d at 861-62, the Nevada Supreme Court did not find the executive clemency instructions given to be "harmless error," but rather, to be "no error."

Moreover, even if the federal court of appeals could "reweigh" a non-weighing "deathworthiness" factor, in lieu of the state court of appeals, notwithstanding all of the authority to the contrary, this would not be the case in which reweighing would bear any fruit for the Conditional Cross-petitioners. An argument made to the Court below, but not reached by it, was as follows: Amongst the 12 jurors who were seated, 7 jurors expressed the opinion during *voir dire* that a finding of guilt as to first degree murder would preclude or probably preclude his/her decision of life imprisonment with the possibility of parole. (See: ER 33: 68-71; ER 34: 247-48; ER 36: 619; ER 33: 101; ER 36: 640-46; ER 36: 595; ER 35: 433, 437; and ER 36: 708). In Nevada, the "penalty jury" is the same 12 people as the "guilt phase jury," and is picked at the beginning of the trial. NRS

175.552(1); 175.021. Pursuant to Morgan v. Illinois, 509 U.S.719, 112 S.Ct. 2222, 2235, 119 L.Ed. 2d 492 (1992), it was constitutional error to allow jurors to sit who were not inclined from the get-go to return one of the three available penalty verdicts. Although Morgan was decided in 1992, Morgan is not a "new rule" to this case because, citing Witherspoon v. Illinois, 391 U.S. 510, 522 (1968), this Court noted in Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed. 2d 443 (1969) that prospective jurors must be willing to consider **all** of the penalties provided by state law and that they may not be irrevocably committed before the trial has begun to reject **any one**. Boulden, 394 U.S. at 482-83, 89 S.Ct. at 1140. However, this jury had over half of its members committed to returning either verdicts of death or life without the possibility of parole, only, from the get-go. The executive clemency instructions herein told this jury that if it returned a verdict of life without the possibility of parole, such a judgment could be commuted by the Pardons' Board, and such a commutee could thereby be paroled and on the streets within ten years of imposition of the sentence. This combination of factors meant that, to over half of Gallego's jury, death was the only realistic option. In view of the blatant Morgan/Boulden constitutional error, which has never yet been addressed by any reviewing court, how any reviewing court could conclude that the "executive clemency" instruction error here is harmless is completely unfathomable. Certainly, Conditional Cross-petitioners do not begin to discuss this point in their Conditional Cross-petition.

Finally, in an attempt to obtain *certiorari* based upon an alleged

conflict in opinions, the Conditional Cross-petitioners suggest that the Nevada Supreme Court's opinions on the subject matter are in conflict, at pages 8-9 of the Conditional Petition. That is simply not so.

In both Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985), cert. denied, 476 U.S. 1130 (1986) and in Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), there is nothing indicating that those capital appellants were either not eligible or not likely for either executive clemency or release on parole pursuant thereto, if they received life without the possibility of parole sentences. In both cases, the Nevada Supreme Court indicated that it was troubled by the clemency instruction actually given, but nowhere in either opinion did the Nevada Supreme Court state that the instruction was either inaccurate or misleading. See: Rogers, 101 Nev. at 468-69, 705 P.2d at 672; Petrocelli, 101 Nev. at 54-56, 692 P.2d at 509-11.

In contrast, however, in Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996), the Nevada Supreme Court vacated the death penalty because the executive clemency instruction given there, although complying with the Nevada Supreme Court's directive of the appropriate executive clemency instruction to give per Petrocelli, was unconstitutional – ultimately, for the same reason that it was unconstitutional in this case; per the terms of NRS 213.1099(4), at the time Geary was convicted, he was not eligible for parole, even if the sentence was commuted. 930 P.2d at 724. The instruction, coupled with the prosecutor's argument, mislead the jury into believing that, in order to avoid the specter of Geary's being released into society, had to

choose death. 930 P.2d at 725.

Interestingly, as support for its conclusion in Geary, the Nevada Supreme Court relied on an executive clemency opinion decided less than two months prior to Gallego, or Jones v. State, 101 Nev. 573, 707 P.2d 1128 (1985). There, the Nevada Supreme Court vacated the death penalty on that appellant, finding that the jury may have imposed the death sentence therein arbitrarily and under the influence of passion, based upon the prosecutor's suggestion to the jury that a sentence of life without the possibility of parole could be commuted, but a sentence of death could not. The latter statement was inaccurate, and thus, the argument as a whole was misleading. Jones, 101 Nev. at 580-81, 707 P.2d at 1133-34.

Taken together, Rogers, Petrocelli, Geary and Jones stand for this simple proposition: An executive clemency instruction which is neither inaccurate nor misleading is not unconstitutional; but an executive clemency instruction which is either inaccurate or misleading is. As we shall next show, that is also precisely the state of federal law. There is simply nothing inconsistent with how the Nevada Supreme Court has handled this issue, except in Gallego at 101 Nev. 782, but the handling there was corrected at 124 F.3d 1065.

C. THIS COURT SHOULD NOT GRANT CERTIORARI ON CONDITIONAL CROSS-PETITIONER'S ASSERTION THAT THE COURT OF APPEALS INCORRECTLY DETERMINED THAT THE EXECUTIVE CLEMENCY INSTRUCTION GIVEN HEREIN VIOLATED THE EIGHTH AMENDMENT

Very frankly, in spite of the length of the Ninth Circuit's published opinion at 124 F.3d 1065, that court's handling of most of the issues was quite summary. The exception was this issue – the

one and only issue upon which Gallego's position was found to be meritorious – and the Ninth Circuit rendered a very thorough, considered opinion.

The bottom line of the Ninth Circuit's journey through the jurisprudence of this issue is that, prior to the final state court disposition herein in December 1985, the hallmark of a constitutional executive clemency instruction is one that is accurate and not misleading. See: Caldwell v. Mississippi, 472 U.S. 320, 342, 105 S.Ct. 2633, 2646, 86 L.Ed. 2d. 231 (1985). [J. O'Connor, concurring]. Conditional Cross-petitioners would have this Court hold that an executive clemency instruction which is technically not an incorrect statement of the law, but which nevertheless is misleading in terms of its import, does not violate the constitution as long as it and the prosecutor do not expressly invite the jury to speculate upon its meaning, and thereby return a death penalty verdict as a result of the misimpression created thereby. But, as the Ninth Circuit noted, at 124 F.3d at 1075, this type of thinking simply has not passed muster with this Court in cases such as Gardner v. Florida, 430 U.S. 349 (1977), and Jurak v. Texas, 428 U.S. 262 (1976), as well as Ramos v. California, 463 U.S. 992 (1983) and Caldwell, *ante*.

Conditional cross-petitioners have further set up their argument to say that, in order to grant Gallego habeas relief, the Ninth Circuit in fact applied the "new rule" of Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed. 2d 133 (1994), in violation of O'Dell v. Netherland, ___U.S.___, 117 S.Ct. 1969, 138 L.Ed. 2d 351 (1997). But the Ninth Circuit probably gave its greatest degree of reliance

upon Hamilton v. Vasquez, *ante*, a case which predated Simmons and in any event, nowhere mentioned Simmons in order to reach its holding. Simmons involves a related but distinct issue of whether, when the jury is called upon to decide "future dangerousness" of the capital petitioner, it is constitutional error not specifically to advise the jury that a life sentence means without possibility of parole. But, Caldwell is actually the more applicable authority of this Court, and Caldwell predates Gallego's conviction by several months. For that matter, many years ago the Nevada Supreme Court also noted that prosecutorial arguments, whether regarding parole eligibility or executive clemency, are not improper so long as they are accurate and not misleading. Bean v. State, 81 Nev. 25, 35-36, 398 P.2d 251, 257 (1965); Summers v. State, 86 Nev. 210, 213, 467 P.2d 98, 100 (1970).

And, the Ninth Circuit's handling of O'Dell was so exactly correct, that little need be added, over and above what was said at 124 F.3d at 1076.[2]

Ironically, the Nevada Supreme Court perfectly stated the "danger" of a misleading executive clemency instruction two months prior to handing down Gallego in Jones v. State, *ante*: The effect of an improper instruction or argument on executive clemency is that the penalty jury will erroneously believe that the sentence of "life

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[2]On the subject of Simmons, it should be noted that even though that capital petitioner physically and sexually assaulted three elderly women before killing a fourth, the plurality of this Court refused to engagein a Brecht review of the error committed *viz.* future dangerousness. The point of the dissent was not that "harmless error" was committed, but that no constitutional error was committed.

without the possibility of parole" is not really a viable sentencing alternative because such a sentence might be commuted and the defendant thereafter might be released into society. Jones, 101 Nev. at 579-81; 707 P.2d 1132-34. We say "ironically," because NRS 213.1099 was in effect at the time Gallego was decided, yet the Nevada Supreme Court nowhere mentioned either that statute or Jones in its opinion. Obviously, that is the reason that prosecutors seek to have "executive clemency" instructions given; and equally as obviously, they don't seek to have them given so that the jury can ignore them and not think about what they may mean. And, in this case, what with over half the jury selected being in favor of no possibility of any release of a convicted first degree murderer ever occurring under any circumstance, one has to know that that is **exactly** why this prosecutor sought to have this instruction given, and why the defense counsel made such a big issue out of it. To ignore this point is to divorce oneself from the reality of the situation.

VII. CONCLUSION

For the foregoing reasons, if this Court should grant Mr. Gallego's Petition for Writ of *Certiorari* in Case No. 97-8160, this Court should nevertheless deny the Respondents and Conditional Cross-

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petitioners' Conditional Cross-petition.

DATED this 5 day of May, 1998.

Respectfully submitted,

LAW OFFICES OF RICHARD F. CORNELL
150 Ridge Street
Reno, Nevada 89501

BY: Richard F. Cornell
Richard F. Cornell,
Attorney for Petitioner and
Conditional Cross-respondent

A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERALD ARMOND GALLEGO, Petitioner-Appellant. vs. E. K. McDANIEL, et al., Respondents-Appellees.	Case No. 96-99006 D.C. No. CV-N-93-631-HDM (Nevada, Reno)

Appeal from the United States District Court
for the District of Nevada

ANSWERING BRIEF OF APPELLEES

RICHARD F. CORNELL, ESQ.
150 Ridge Street, 2nd Floor
Reno, Nevada 89501

ATTORNEY FOR PETITIONER-APPELLANT.

FRANKIE SUE DEL PAPA
Attorney General
ROBERT E. WIELAND
Deputy Attorney General
Criminal Justice Division
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710

ATTORNEY FOR RESPONDENTS-APPELLEES.

At trial, GALLEGO did not show good cause in support of his motion to continue his trial. As a result, there was not an abuse of discretion for the failure to grant his motion for continuance nor was there a violation of due process. However, should this court determine that the trial court abused its discretion, this error does not rise to the level of a federal due process error because his trial was not arbitrary or fundamentally unfair as GALLEGO pointed to no witnesses below who, but for time limitations prior to and during trial, could have been produced.

G. The Federal District Correctly Denied Federal Habeas Relief On The Claim Presented In Ground Ten Of The Instant Federal Petition.

GALLEGO alleged in ground ten that:

> The trial court denied petitioner a fair penalty hearing and due process of law by instructing the jury at the penalty hearing that executive clemency was available to a person sentenced to life without possibility of parole.

At the penalty phase of GALLEGO's trial, the jury received the following instructions:

Instruction No. 5, in its entirety, states:

> The punishment of death may be imposed only if one or more of the aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.
>
> Otherwise, the punishment imposed shall be imprisonment in the state prison for life with or without the possibility of parole.
>
> You are instructed that the sentence of life imprisonment without the possibility of parole does not exclude executive clemency.

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> If the punishment is fixed at life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of ten years has been served.
>
> Instruction No. 6
>
> Executive clemency involves a decision by the State Board of Pardon Commissioners to commute or reduce a defendant's sentence from life without possibility of parole to life with possibility of parole.
>
> Executive clemency may also involve a decision by the State Board of Pardon Commissioners to shorten the time a defendant is eligible for parole.
>
> The State Board of Pardon Commissioners consists of the Governor, the Attorney General,and the five Justices of the Supreme Court of the State of Nevada. The Board can change a sentence only by a majority vote, and only if the Governor is in the majority voting to change the sentence.

CR 66, Exhibit 222(B) at 2036. At trial, GALLEGO objected to Penalty Instruction No. 6 on the basis that the law as stated in the instruction could possibly be changed by public referendum. In his petition, GALLEGO shifted the focus of his arguments to whether the instruction adequately explained Nevada law on executive clemency. CR 1, CR 36.

"In analyzing whether a sentencing phase instruction violates the Eighth Amendment, a court must determine if there is a reasonable likelihood that the jury applied the instruction in such a way that prevented consideration of relevant mitigating evidence." Hamilton v. Vasquez, 17 F.3d 1149, 1160 (9th Cir.) cert. denied sub nom. Calderon v. Hamilton, 114 S.Ct. 2706 (1994) (citing Boyde v. California, 494 U.S. 370, 380 (1990)). Thus, if a penalty phase instruction "prevents the jury from giving a reasoned moral response to the petitioner's mitigating evidence,

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or creates the risk that the death penalty would be imposed despite evidence which may call for a life sentence," it violates the eighth amendment. Id. (citations omitted). In Hamilton, the Ninth Circuit found constitutional error in a lengthy instruction on commutation that was designed to correct a misleading instruction which was given concurrently. The court found the combination of instructions to be unacceptable because they were confusing and forced the jury to speculate on the likelihood of commutation. Id. at 1163. GALLEGO did not argue below that the executive clemency instruction given to the jury at the sentencing phase of his trial misstated the law. Rather, he contended that it was misleading because it failed to adequately and accurately explain how remote the possibility of parole would be in his case. CR 36 at 79-80. In Nevada, the parole board (as distinguished from the pardons board) may not release a prisoner who has his life sentence commuted to include the possibility of parole unless,

> it finds that the prisoner has served at least 20 consecutive years in the state prison, is not under an order that he be detained to answer for a crime or violation of parole or probation in another jurisdiction, and that he has no history of:
>
> (a) Recent misconduct in the institution, and that he has been recommended for parole by the director of the department of prisons;
>
> (b) Repetitive criminal conduct;
>
> (c) Criminal conduct related to the use of alcohol or drugs;
>
> (d) Repetitive sexual deviance, violence or aggression; or

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(e) Failure in parole, probation, work release or similar programs.

NRS 213.1099-4 (provision enacted 1981 Nev. Stat. 873).

Although the Penalty Instruction No. 6 failed to explain the intricate limitations on the parole of a prisoner with a commuted sentence, it was not so inaccurate or misleading that this court finds it reasonably likely that the jury failed to consider relevant mitigating factors. Each statement in the instructions accurately stated the law. An instruction which contains all of the factors relevant to clemency and parole runs the risk of unduly focusing the jury's attention on those issues, thereby encouraging the jurors to speculate on the likelihood that the defendant's sentence would be commuted. And where a clemency instruction is allowed to inform the jury that a sentence of life without the possibility of parole is subject to executive clemency, brevity is valued. See generally Hamilton, 17 F.3d at 1160, 1162, 1163 (repeatedly noting the "two-sentence instruction" approved in California v. Ramos, 463 U.S. 992 (1983)).

Hamilton is distinguishable from this case. In that case, the instruction at issue began with the two-sentence clemency instruction approved by the United States Supreme Court in Ramos. Hamilton, 17 F.3d at 1161-62. However, the instruction went on to partially discuss a limitation on the commutation power for twice-convicted felons. It also inaccurately suggested that the imposition of any life sentence would cause Hamilton to be eligible for parole in less than seventeen years. Id. Further, the disapproved instruction cautioned the jury not to speculate on the likelihood that Hamilton would be pardoned or paroled. Id.

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On these facts, the court found that the "jury . . . was diverted from [the task of considering relevant mitigating evidence] by having its attention focused on commutation procedures rather than the significant mitigating evidence defense counsel introduced at the penalty phase." Id. at 1163.

Although Penalty Instruction No. 6 did discuss the composition of the Nevada State Board of Pardon Commissioners and that a sentence can be changed only by a majority of the Pardons Board which must include the governor, it did not urge the jury to speculate on the possible votes. Neither did the instruction inaccurately suggest that any life sentence would automatically lead to parole eligibility.

In addition to the objectionable content of the instruction, the Hamilton court found that "[t]he probability of the jury's improper speculation was compounded by the prosecutor's inappropriate assertion in closing argument that Hamilton, if sentenced to prison, would be conniving and devising ways to manipulate the system and get out." 17 F.3d at 1162. In closing argument, the prosecution relied on "inflammatory and largely irrelevant letters written by Hamilton" to support its contention. Id. The prosecutor in GALLEGO's trial did not engage in such conduct.

GALLEGO contends that Instruction No. 5 was inaccurate because it stated that if the punishment is fixed at life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of ten years has been served. GALLEGO states that it is inaccurate because NRS 213.1099-4 requires that GALLEGO serve a minimum of 20 years. GALLEGO's

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statement is false and a deliberate attempt to mislead this Court. Had the jury imposed a sentence of life with the possibility of parole as stated by the instruction, GALLEGO would have been eligible for parole within ten years as stated by the instruction. NRS 200.030, 1977 Statutes of Nevada 864. In his brief GALLEGO has deliberately misinterpreted NRS 213.1099-4 to suggest that if the jury sentenced him to life with the possibility of parole, NRS 213.1099-4 would apply and GALLEGO would have to serve 20 years before he was eligible for parole, contrary to the instruction. That suggestion is false. NRS 213.1099-4 would apply only if GALLEGO had been sentenced to life imprisonment without the possibility of parole and the pardons board (as distinguished from the parole board) and had commuted his sentence to a sentence allowing parole, i.e., life with the possibility of parole and the parole board was going to consider parole.

H. The Federal District Court Correctly Denied Federal Habeas Relief On His Claim Advanced In Ground Fourteen Of The Petition.

GALLEGO alleged in ground fourteen that:

> Petitioner was deprived of [the] effective assistance of counsel, in that trial counsel failed to challenge the contingent, revocable plea bargain of the alleged accomplice as violative of due process of law.

Plea bargains are often contingent upon an agreement that the beneficiary will testify against others. See United States v. Moody, 778 F.2d 1380, 1385, amended 791 F.2d 707 (9th Cir. 1986). Further, where a plea agreement requires the witness to testify truthfully and completely, the agreement is not so coercive that it violates due process simply because the benefit is contingent

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B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERALD ARMOND GALLEGO, Petitioner-Appellant. vs. E. K. McDANIEL, et al., Respondents-Appellees.	Case No. 96-99006 D.C. No. CV-N-93-631-HDM (Nevada, Reno)

Appeal from the United States District Court
for the District of Nevada

ANSWERING BRIEF OF APPELLEES

RICHARD F. CORNELL, ESQ.
150 Ridge Street, 2nd Floor
Reno, Nevada 89501

ATTORNEY FOR PETITIONER-APPELLANT.

FRANKIE SUE DEL PAPA
Attorney General
ROBERT E. WIELAND
Deputy Attorney General
Criminal Justice Division
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710

ATTORNEY FOR RESPONDENTS-APPELLEES.

Cartwright, in light of the crimes and the nature of the crimes and GALLEGO's prior criminal record, would not have resulted in a different sentence. Having failed to establish that presentation of such evidence probably would have resulted in a lesser sentence, GALLEGO cannot establish that trial counsel was ineffective for failing to present such evidence, and, thus, cannot establish prejudice to overcome procedural default. The federal district court properly found that ground 39 was procedurally barred.

M. If This Court Should Find Error, Such Error Is Harmless.

If this Court should find error, Respondents respectfully submit that any such error is harmless. Further, respondents submit that this court should apply the harmless-error standard enunciated in Brecht v. Abrahamson, ____ U.S. ____, 113 S.Ct. 1710 (1993). In Brecht, the United States Supreme Court held that the standard for determining whether habeas relief must be granted is whether the Doyle error "had substantial and injurious effect or influence in determining the jury's verdict." If this Court should find error, this Court should determine whether the error had a substantial and injurious effect or influence in determining the jury's verdict.

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aggravating circumstances sufficiently specific to render terms "torture," "depravity of mind" and "mutilation" not unconstitutionally vague. Deutscher v. Whitley, 682 F. Supp. 1098 (D. Nev. 1988)

Depravity instruction not equivalent to insanity instruction and not constitutionally improper. NRS 200.033 provides that first degree murder may be aggravated if jury finds that murder involved torture, depravity of mind or mutilation of victim. On petition for writ of habeas corpus, petitioner contended that depravity instruction unconstitutionally allowed jury to find aggravating circumstance from fact that defendant was unable to tell difference between right and wrong or to appreciate value of human life. Court found that instruction was not equivalent to insanity instruction because insanity instruction requires defendant to suffer from mental disease or defect which prevented him from understanding right and wrong. Depravity instruction merely requires that there be condition of mind that defendant lacks moral sense and possesses evil or vile state of mind. Therefore, there was no constitutional impropriety in using petitioner's depraved state of mind as aggravating circumstance against him. Deutscher v. Whitley, 682 F. Supp. 1098 (D. Nev. 1988)

Jury instruction concerning aggravating circumstance of depravity of mind was unconstitutional. Jury instruction concerning aggravating circumstance of depravity of mind (see NRS 200.033) that failed to channel and limit jury's discretion in imposing death penalty did not sufficiently minimize risk of wholly arbitrary and capricious action and was unconstitutional. Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989), cited, Baal v. State, 106 Nev. 69, at 74, 787 P.2d 391 (1990)

NRS 200.035 Circumstances mitigating first degree murder. Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:

1. The defendant has no significant history of prior criminal activity.
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
3. The victim was a participant in the defendant's criminal conduct or consented to the act.
4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.
5. The defendant acted under duress or under the domination of another person.
6. The youth of the defendant at the time of the crime.
7. Any other mitigating circumstance.

(Added to NRS by 1977, 1543)

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Homicide ⇐ 357(4).
WESTLAW Topic No. 203.
C.J.S. Homicide §§ 367, 368.

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Death penalty was not cruel and unusual punishment. Death penalty imposed pursuant to NRS 175.552 et seq., 200.033 and 200.035 was not cruel and unusual punishment and did not offend either U.S. Constitution or Nevada constitution (see Nev. Art. 1, § 6). Bishop v. State, 95 Nev. 511, 597 P.2d 273 (1979), cited, Deutscher v. State, 95 Nev. 669, at 677, 601 P.2d 407 (1979), Lenhard v. Wolff, 443 U.S. 1306, 100 S. Ct. 3 (1979), Rogers v. State, 101 Nev. 457, at 465, 705 P.2d 664 (1985), Ford v. State, 102 Nev. 126, at 138, 717 P.2d 27 (1986), see also Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985), Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987)

Effect of disregarding defendant's mental and physical impairments as mitigating circumstances. At penalty hearing, pursuant to NRS 175.558, for defendant convicted of murder of first degree, panel of three judges did not improperly disregard defendant's various mental and physical impairments in finding that no mitigating circumstances (see NRS 200.035) existed which were sufficient to outweigh aggravating circumstances, because, after considering evidence, panel could have reasonably found that defendant's mental condition was only character disorder which did not bar imposition of penalty of death. Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985), cited, Baal v. State, 106 Nev. 69, at 74, 787 P.2d 391 (1990)

Comments concerning youth of defendant not improper at penalty hearing. Prosecutor's comments at penalty hearing for murder of first degree (see NRS 175.552) regarding defendant's

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the prosecuting attorney, before the commencement of the trial, files and serves upon the defendant a written notice of his intention to request such a hearing.

2. A hearing requested pursuant to subsection 1 must be conducted before:

(a) The court imposes its sentence; or

(b) A separate penalty hearing is conducted.

3. At the hearing, only evidence concerning the question of whether the offense was sexually motivated may be presented. The prosecuting attorney must prove beyond a reasonable doubt that the offense was sexually motivated.

4. The court shall enter its finding in the record.

5. For the purposes of this section, an offense is "sexually motivated" if one of the purposes for which the person committed the offense was his sexual gratification.

(Added to NRS by 1995, 413; A 1997, 1666)

PENALTY HEARING FOR FIRST DEGREE MURDER

NRS 175.552 Requirement; jury; panel of judges; evidence; waiver.

1. Except as otherwise provided in subsection 2, in every case in which there is a finding that a defendant is guilty of murder of the first degree, whether or not the death penalty is sought, the court shall conduct a separate penalty hearing. The separate penalty hearing must be conducted as follows:

(a) If the finding is made by a jury, the separate penalty hearing must be conducted in the trial court before the trial jury, as soon as practicable.

(b) If the finding is made upon a plea of guilty or guilty but mentally ill or a trial without a jury and the death penalty is sought, the separate penalty hearing must be conducted before a panel of three district judges, as soon as practicable.

(c) If the finding is made upon a plea of guilty or guilty but mentally ill or a trial without a jury and the death penalty is not sought, the separate penalty hearing must be conducted before the judge who conducted the trial or who accepted the plea, as soon as practicable.

2. In a case in which the death penalty is not sought, the parties may by stipulation waive the separate penalty hearing required in subsection 1. When stipulating to such a waiver, the parties may also include an agreement to have the sentence, if any, imposed by the trial judge. Any stipulation pursuant to this subsection must be in writing and signed by the defendant, his attorney, if any, and the prosecuting attorney.

3. In the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible. Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States or the constitution of the State of Nevada may be introduced. The state may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, other than the aggravated nature of the offense itself, only if it has been disclosed to the defendant before the commencement of the penalty hearing.

4. In a case in which the death penalty is not sought, the jury or the trial judge shall determine whether the defendant should be sentenced to life with the possibility of parole or life without the possibility of parole.

(Added to NRS by 1977, 1543; A 1993, 322; 1995, 258, 2451)

IN THE SUPREME COURT OF THE UNITED STATES

GERALD ARMOND GALLEGO,

Petitioners,

vs.

E. K. McDANIEL, Warden, Ely State Prision; ROBERT BAYER, Director, Nevada Department of Prisons; FRANKIE SUE DEL PAPER, Attorney General of the State of Nevada,

Resondents.

_____/

Case No. 97-1632

CERTIFICATE OF SERVICE

I, RICHARD F. CORNELL, the attorney of record for Petitioner GERALD ARMOND GALLEGO in the above-entitled proceeding, does hereby certify that, on the 5 day of May, 1998, I caused to have copies of the BRIEF OF CROSS-RESPONDENT IN OPPOSITION TO THE CONDITIONAL CROSS-PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT mailed as noted below in duly addressed envelopes, with first-class postage prepaid, to each person below. All of the following parties have been served and this mailing occurred within the time permitted under the Rules of the Supreme Court of the United States.

DAVID F. SARNOWSKI
Chief Deputy Attorney General
Criminal Justice Division
100 North Carson Street
Carson City, Nevada 89701-4717
[1 copy]

RICHARD F. CORNELL, Esq.
150 Ridge St., 2nd Flr.
Reno, Nevada 89501
(702)329-1141